Kamariah bt Ali & Anor v Majlis Agama Islam dan Adat Melayu Terengganu & Ors

COURT OF APPEAL (KUALA LUMPUR) — CIVIL APPEAL NO W-01–22 OF 2006

ABU SAMAH, AZHAR MA'AH AND CLEMENT SKINNER JJCA

18 JULY 2011

Civil Procedure — Jurisdiction — Shariah Court — Appellants claimed to have renounced Islam and challenged jurisdiction of Shariah Court — Whether Shariah Court had jurisdiction to deal with applications pertaining to apostasy — Criminal Offences (Takzir) Enactment (Terengganu Enactment) 2001 s 113(b)(x) — Administration of Islamic Religious Affairs Enactment 1986 s 205(2) — Federal Constitution arts 11 & 121(1A)

Both the appellants, who were Muslims, were arrested in a raid at the 'Ayah Pin' village in the District of Besut, Terengganu. They were charged under the Criminal Offences (Takzir) Enactment (Terengganu Enactment) 2001 at the Shariah High Court of Kuala Terengganu and subsequently released on bail pending hearing of their case in the Shariah High Court of Kuala Terengganu. By way of an originating summons, the appellants filed an application against the first defendant, a body established under the Administration of Islamic Religious Affairs Enactment 1986 ('the Enactment') for various declaratory orders, which included, inter alia, a declaration that the act of the religious authorities of Terengganu and the Shariah Court were against their rights under art 11(1) of the Federal Constitution ('Constitution'). It was the appellants' contention that they had renounced Islam and that as such, the Shariah Court had no jurisdiction in this matter. The High Court found that there were special provisions in the Terengganu Enactment that conferred jurisdiction on the Shariah Court to determine whether a person was no longer a Muslim or had become an apostate and that in such circumstances, the civil court ought not to interfere in matters that would lie exclusively within the jurisdiction of the Shariah Court. The High Court thus dismissed the appellants' application with costs. This was the appellants' appeal against that decision. The appellants challenged the jurisdiction of the Shariah Court by relying on art 11(1) of the Constitution, which guarantees the right and freedom of every Malaysian citizen of whatever race to profess and practice his or her beliefs free of any hindrance. The central issue for determination in this case was one of jurisdiction, ie whether the Shariah Court had the jurisdiction to deal with applications pertaining to apostasy.

Held, dismissing the appeal with costs:

In the instant case, s 113(b)(x) of the Terengganu Enactment clothed the Shariah Court with the authority and jurisdiction to deal with and hear matters pertaining to apostasy. Further, s 205(2) of the enactment also conferred exclusive jurisdiction on the Shariah Court to hear applications pertaining to apostasy. As apostasy was the subject matter of the present case, it was crystal clear that it was within the exclusive domain of the Shariah Court. This court agreed with the findings of the High Court judge that by virtue of art 121(1A) of the Federal Constitution, s 113(b)(x) of the Terengganu enactment and also s 205(2) of the Enactment, matters pertaining to apostasy in the state were within the sole domain of the Shariah Court of the state (see paras 13–17).

[Bahasa Malaysia summary

Kedua-dua perayu yang beragama Islam telah ditangkap di dalam serbuan di kampung 'Ayah Pin' di Daerah Besut, Terengganu. Mereka dituduh di bawah Enakmen Kesalahan Jenayah (Takzir) (Enakmen Terengganu) 2001 di Mahkamah Tinggi Syariah Kuala Terengganu dan kemudiannya dilepaskan dengan ikat jaminan sementara menunggu pendengaran kes mereka di Mahkamah Tinggi Shariah Kuala Terengganu. Melalui saman pemula, perayu-perayu memfailkan permohonan terhadap defendan pertama, badan yang ditubuhkan di bawah Enakmen Pentadbiran Hal Ehwal Agama Islam 1986 ('Enakmen') untuk pelbagai perintah perisytiharan, yang mana termasuk, antara lain, perisytiharan bahawa tindakan pihak berkuasa agama Terengganu dan Mahkamah Syariah adalah bertentangan hak-hak mereka di bawah perkara 11(1) Perlembagaan Persekutuan ('Perlembagaan'). Ia adalah hujahan perayu bahawa mereka telah keluar daripada agama Islam dan oleh itu, Mahkamah Shariah tidak mempunyai bidang kuasa dalam perkara ini. Mahkamah Tinggi mendapati bahawa terdapat peruntukan khas di dalam Enakmen Terengganu yang memberikan bidang kuasa kepada Mahkamah Syariah untuk menentukan sama ada seseorang itu bukan lagi seorang Islam atau menjadi murtad dan dalam keadaan sedemikian, mahkamah sivil patut tidak campur tangan dalam perkara-perkara yang terdapat secara eksklusif dalam bidang kuasa Mahkamah Syariah. Mahkamah Tinggi oleh itu menolak permohonan perayu-perayu dengan kos. Ini adalah rayuan perayu-perayu terhadap keputusan tersebut. Perayu-perayu mencabar bidang kuasa Mahkamah Syariah dengan bergantung kepada perkara 11(1) Perlembagaan, yang menjamin hak dan kebebasan setiap warganegara Malaysia tanpa mengira bangsa untuk mengaku dan mengamal kepercayaannya bebas daripada apa-apa halangan. Isu utama untuk penentuan dalam kes ini adalah bidang kuasa iaitu sama ada Mahkamah Syariah mempunyai bidang kuasa untuk berurusan dengan permohonan-permohonan berkaitan murtad.

Diputuskan, menolak rayuan dengan kos:
Dalam kes ini, s 113(b)(x) Enakmen Terengganu memperuntukkan Mahkamah Syariah dengan kuasa dan bidang kuasa untuk berurusan dengan atau mendengar perkara-perkara berkaitan murtad. Selanjutnya, s 205(2)

enakmen juga memberikan bidang kuasa eksklusif kepada Mahkamah Syariah untuk mendengar permohonan-permohonan berkaitan murtad. Memandangkan murtad adalah perkara subjek kes ini, adalah jelas bahawa ia adalah dalam domain eksklusif Mahkamah Syariah. Mahkamah ini bersetuju dengan dapatan hakim Mahkamah Tinggi bahawa mengikut perkara 121(1A) Perlembagaan, s 113(b)(x) Enakmen Terengganu dan juga s 205(2) Enakmen, perkara-perkara berkaitan murtad dalam negeri adalah dalam domain tunggal Mahkamah Syariah negeri tersebut (lihat perenggan 13–17).]

Notes

For cases on Syariah Court, see 2(2) *Mallal's Digest* (4th Ed, 2010 Reissue) paras 5126–5127.

Cases referred to

Kamariah bte Ali dan lain-lain lwn Kerajaan Negeri Kelantan dan satu lagi [2005] 1 MLJ 197; [2004] 3 CLJ 409, FC (refd)

Latifah bte Mat Zin v Rosmawati bte Sharibun & Anor [2007] 5 MLJ 101, FC (refd)

Lina Joy v Majlis Agama Islam Wilayah Persekutuan & Ors [2005] 6 MLJ 193; [2005] 4 CLJ 666, CA (refd)

Majlis Ugama Islam Pulau Pinang dan Seberang Perai v Shaik Zolkaffily bin Shaik Natar & Ors [2003] 3 MLJ 705, FC (refd)

Legislation referred to

Administration of Islamic Religious Affairs Enactment 1986 ss 32(1), 205(2)
Federal Constitution arts 11(1), 121, 121(1A)
Syariah Court (Terengganu) Enactment 2001 s 11(3)(b)(x)

Appeal from: Originating Summons No R1–24–65 of 2005 (High Court, Kuala Lumpur)

Haris Ibrahim (Malik Imtiaz Sarwar with him) (Haris & Co) for the appellants.
Zamani Mohamed (Zamani Mohamed & Co) for the first respondent.
Norbahari Baharudin (State Legal Adviser of Terengganu) for the second respondent.
Shamsul Bolhassan (Attorney General's Chambers) for the intervener.

Azhar Ma'ah JCA (delivering judgment of the court):

[1] This is an appeal against the decision of Raus Sharif J (as he then was) who on 30 December 2005 dismissed the plaintiffs' applications vide originating summons (*lampiran* 1) and summons in chambers (*lampiran* 3) both dated 15 August 2005.

[2] By the originating summons, the plaintiffs seek the following orders: **A**

(a) deklarasi bahawa plaintif pertama dan plaintif kedua mempunyai hak yang mutlak dan bebas di bawah artikel 11(1) Perlembagaan Persekutuan untuk memilih sama ada untuk menganuti mana-mana agama dan, jika ia, untuk menganuti (*profess*) dan mengamalkan (*practise*) agama pilihan mereka sendiri; **B**

(b) deklarasi bahawa hak mutlak dan kebebasan plaintif pertama dan plaintif kedua di bawah artikel 11(1) Perlembagaan Persekutuan untuk memilih sama ada untuk menganuti mana-mana agama dan, jika ia, untuk menganuti (*profess*) dan mengamal (*practise*) agama pilihan mereka sendiri dan agama yang dianuti (*professed*) dan diamalkan (*practised*) oleh plaintif pertama dan plaintif kedua adalah ditentukan oleh plaintif pertama dan plaintif kedua sendiri dan bukan oleh atau tertakluk kepada pengisytiharan dan/atau pengesahan mana-mana pihak yang lain; **C**

(c) deklarasi bahawa artikel 11(1) Perlembagaan Persekutuan mempunyai keutamaan ke atas dan akan mengatasi mana-mana undang-undang persekutuan atau enakmen-enakmen negeri berkenaan dengan perkara pengakuan dan pengamalan agama pilihan plaintif pertama dan plaintif kedua; **D**

(d) deklarasi bahawa peruntukan-peruntukan dalam mana-mana undang-undang persekutuan atau enakmen-enakmen negeri atau mana-mana peraturan-peraturan termasuk tetapi tidak terhad kepada Enakmen Kesalahan Jenayah Syariah (Takzir) (Terengganu) 2001, yang tidak mengiktirafkan artikel 11(1) Perlembagaan Persekutuan atau adalah bertentangan dengannya, adalah tidak sah; **E**

(e) deklarasi bahawa memandangkan plaintif pertama dan plaintif kedua telah menguatkuasakan hak mutlak mereka di bawah artikel 11(1) Perlembagaan Persekutuan untuk memilih sama ada untuk menganuti mana-mana agama dan, jika ia, untuk menganuti (*profess*) dan mengamalkan (*practise*) agama pilihan mereka sendiri dengan mengisytiharkan diri mereka tidak lagi menganuti (*profess*) dan mengamal (*practise*) agama Islam, mana-mana undang-undang persekutuan dan enakmen-enakmen negeri berkenaan dengan agama Islam termasuk tetapi tidak terhad kepada Enakmen Kesalahan Jenayah Syariah (Takzir) (Terengganu) 2001 adalah tidak terpakai terhadap plaintif pertama dan plaintif kedua; **F** **G**

(f) deklarasi bahawa peruntukan dalam apa jua undang-undang persekutuan dan enakmen-enakmen negeri, sekiranya ada, yang kononnya memberi kuasa atau bidang kuasa kepada Mahkamah Syariah untuk menentukan sama ada plaintif pertama dan plaintif kedua telah keluar dari agama Islam atau mengkehendaki suatu deklarasi dari Mahkamah Syariah sebagai pra-syarat sebelum plaintif pertama dan plaintif kedua dapat atau dianggap telah keluar dari agama Islam adalah bertentangan dengan artikel 11(1) Perlembagaan Persekutuan; **H**

(g) deklarasi bahawa peruntukan-peruntukan dalam mana-mana undang-undang persekutuan atau enakmen-enakmen negeri atau mana-mana peraturan-peraturan yang menyekat atau melarang atau yang mengenakan syarat-syarat terhadap dan ke atas hak mutlak plaintif pertama dan plaintif kedua sendiri untuk memilih sama ada untuk menganuti mana-mana agama **I**

dan, jika ia, untuk menganuti (*profess*) dan mengamalkan (*practise*) agama pilihan mereka sendiri dan selaras hak tersebut, untuk mengisytiharkan diri mereka tidak lagi menganuti (*profess*) dan mengamal (*practise*) agama Islam adalah bertentangan dengan Perlembagaan Persekutuan khususnya artikel 11(1) dan adalah tidak sah;

(h) deklarasi bahawa defendan pertama, kakitangan dan/atau ejennya dan setiap pihak berkuasa agama Islam di Negeri Terengganu, termasuklah tetapi tidak terhad kepada Mahkamah-Mahkamah Tinggi dan Rendah Syariah Negeri Terengganu dan Jabatan Hal Ehwal Agama Terengganu tidak mempunyai apa-apa bidang kuasa ke atas plaintif pertama dan plaintif kedua;

(i) berlanjutan dengan perintah (1)–(8) di atas, deklarasi bahawa berdasarkan Perlembagaan Persekutuan khususnya artikel 11(1), defendan pertama dan/atau defendan kedua atau mana-mana pihak yang bertindak di bawah arahan dan/atau jagaan defendan pertama dan/atau defendan kedua tidak berhak mengenakan atau menentukan apa-apa syarat atau pra-syarat sebelum plaintif pertama dan plaintif kedua dapat atau dianggap tidak lagi menganuti (*profess*) dan mengamal (*practise*) agama Islam; dan

(j) lain-lain perintah yang difikirkan perlu atau sesuai oleh Mahkamah yang mulia ini.

[3] The facts of this case have been meticulously set out by the learned trial judge in his judgment which we shall not repeat except wherever necessary and relevant to the issue to be determined by this court.

[4] The undisputed facts underlining this case are that the two plaintiffs are Muslims and the first defendant is a body established under the Administration of Islamic Religious Affairs Enactment 1986 (the 1986 Enactment), an Enactment concerning the administration and enforcement of Islamic religious affairs, regulation and management of the Islamic religious authority and other related matters. Ordinarily, the parties would come within the criminal jurisdiction of the syariah court by virtue of s 32(1) of the said Enactment.

[5] From the factual matrix of the case it is apparent that the present action was triggered off by the following facts and scenario which we now reproduce as they appear in the learned trial judge's judgment.

11. … pada 20 Julai 2005, pegawai-pegawai Jabatan Hal Ehwal Agama Terengganu (JHEAT) dengan bantuan pihak polis telah melakukan satu serbuan di Kampong Ayah Pin di Daerah Besut, Terengganu, dan telah menahan ramai penduduk termasuklah kedua-dua plaintif.

12. Keesokannya pada 21 Julai 2005, kedua-dua plaintif telah dibawa ke Mahkamah Rendah Syariah Besut dan ditahan tanpa jaminan sehingga dikemukakan di Mahkamah semula pada 28 Julai 2005. Pada 28 Julai 2005, Mahkamah Rendah Syariah Besut telah membenarkan plaintif kedua diikat jamin tetapi plaintif

pertama diperintahkan ditahan seterusnya. Kes mereka telah dipindahkan ke Mahkamah Tinggi Syariah, Kuala Terengganu.

13. Pada 4 Ogos 2005, kedua-dua plaintif telah dituduh dan di Mahkamah Tinggi Syariah Kuala Terengganu di bawah s 10 EnakmenKesalahan Jenayah (Takzir) (Terengganu) 2001. Plaintif pertama juga dikenakan tuduhan kedua di bawah s 7 Enakmen yang sama. Plaintif pertama kemudiannya, seperti plaintif kedua telah dibebaskan dengan ikatan jaminan sementara menunggu perbicaraan kes mereka di Mahkamah Tinggi Syariah Kuala Terengganu.

[6] Arising from the abovementioned events the plaintiffs filed the present applications praying for the aforementioned orders.

[7] The learned trial judge apparently in dealing with the applications has extensively dealt with the issue of jurisdiction. Indeed, on the facts set out in his grounds of judgment the central issue before us is on the question of jurisdiction of the courts ie whether the subject matter before the High Court is within the jurisdiction of the civil courts or the Shariah Courts. This demarcation of the jurisdiction of the two courts came about following the amendment to art 121 of the Federal Constitution. Article 121(1A) came into being and read as follows:

> (1A) The courts referred to in Clause (1) shall have no jurisdiction in respect of any matter within the jurisdiction of the Syariah Courts.

The courts referred to in cl (1) are the civil courts.

[8] Obviously, the mainstay of the plaintiffs' applications is art 11(1) of the Federal Constitution which reads:

> 11(1) Every person has the right to profess and practise his religion.

[9] This brief article in no uncertain terms guarantees the right and freedom of every citizen of whatever race to profess and practise his or her beliefs free of any hindrance. Applying the article in question against the background and factual matrix of the instant case, counsel for the plaintiffs submitted that two issues referred to in the summons in chambers arose for determination by the court, namely:

(a) sama ada hak untuk menganuti agama di bawah perkara 11(1) Perlembagaan Persekutuan merangkumi hak seseorang beragama Islam yang telah mencapai umur majoriti untuk mengisytiharkan keluar dari agamanya; dan

(b) sama ada undang-udang yang menghadkan atau mengenakan sekatan-sekatan yang lain ke atas hak seseorang (selain dari mereka yang belum mencapai umur majoriti) untuk mengisytiharkan keluar dari

agamanya adalah tidak konsisten dengan perkara 11(1) Perlembagaan Persekutuan dan demikian tidak sah.

[10] Counsel for the plaintiffs submits that the above issues still remain lingering with uncertainties in the High Court as well as the appellate court have declined jurisdiction to deliberate and determine the issues on merits. The apex court in *Kamariah bte Ali dan lain-lain lwn Kerajaan Negeri Kelantan dan satu lagi* [2005] 1 MLJ 197; [2004] 3 CLJ 409 had refused to deal with somewhat similar issue before it, on the grounds that they were rightly brought before the Shariah Court because they were in relation to an offence committed when the appellants were still Muslims. The rationale of this purposive approach according to the Federal Court is to prevent Muslims who are charged in Shariah Courts from conveniently raising the defence that they are not practising Muslims and thus not subject to the jurisdiction of the Shariah Court. Again in another case, *Lina Joy v Majlis Agama Islam Wilayah Persekutuan & Ors* [2005] 6 MLJ 193; [2005] 4 CLJ 666, the Court of Appeal similarly held that the High Court had no jurisdiction in respect of matters of the religious status of Muslims. This decision was affirmed by the Federal Court in a majority decision thus leaving the issue remaining unresolved. By reason of this we have been urged by learned counsel for the plaintiffs to allow the appeal and have the issues resolved.

[11] The learned judge in dismissing the plaintiffs' application had these to say:

> 18. Pada saya persoalan sebenar yang hendak diketengahkan oleh kedua-dua plaintif di dalam kes ini adalah kesan pengisytiharan mereka bahawa mereka tidak lagi menganuti dan mengamalkan agama Islam. Dengan lain perkataan mereka mahukan Mahkamah Sivil menentukan sama ada mereka telah keluar dari agama Islam …
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> 19. Pada saya, soal sama ada plaintif-plaintif yang dahulu beragama Islam dan selepas itu mengisytiharkan telah keluar daripada agama Islam adalah perkara di dalam bidang kuasa Mahkamah Syariah dan Mahkamah Sivil tidak mempunyai bidang kuasa terhadap perkara tersebut. Ini adalah selaras dengan peruntukan dalam Perlembagaan Persekutuan di mana Perkara 121(1A) dengan jelasnya memperuntukkan bahawa 'Mahkamah Sivil tidak mempunyai bidang kuasa berkenaan dengan apa-apa perkara dalam bidang kuasa Mahkamah Syariah'.

[12] In *Majlis Ugama Islam Pulau Pinang dan Seberang Perai v Shaik Zolkaffily bin Shaik Natar & Ors* [2003] 3 MLJ 705 the Federal Court had this to say:

> … whilst we agree with the approach adopted by Abdul Hamid J following Habibullah, that when there is challenge to jurisdiction the correct approach is to look at the State Enactment to see whether or not the Shariah Courts have been expressly conferred jurisdiction on a given matter …

[13] In the instant case s 11(3)(b)(x) of the Enakmen Mahkamah Syariah (Terengganu) is the provision that clothed the Shariah Court with authority and jurisdiction to deal with and hear matters pertaining to apostasy. The said provision reads as follows:

> 11(3) Mahkamah Tinggi Syariah hendaklah
>
> (b) dalam bidangkuasa malnya mendengar dan memutuskan semua tindakan dan prosiding jika semua pihak dalam tindakan atau prosiding itu adalah orang Islam dan tindakan atau prosiding itu adalah berhubungan dengan:
>
> (x) pengisytiharan bahawa seseorang itu bukan lagi orang Islam.

[14] Over and above that provision there is also s 205(2) of the Administration of Islamic Religious Affairs Enactment 1986 that confers exclusive jurisdiction on the Shariah Court to deal with and hear applications pertaining to apostasy. Section 205(2) reads:

> 205 (2) Tidaklah boleh sesiapa kecuali Hakim Syar'i, memutuskan seseorang yang menganut Agama Islam sebagai murtad, syirik atau kafir.

[15] As we have earlier mentioned the central issue before the learned judge is one of jurisdiction. The answer to that can be found from the aforementioned statutory provision. It is crystal clear that the subject matter before the judge is within the exclusive domain of the Shariah Court.

[16] To further fortify our above view, it would be in place to quote a passage from the Federal Court decision in *Latifah bte Mat Zin v Rosmawati bte Sharibun & Anor* [2007] 5 MLJ 101, where Abdul Hamid Mohamad FCJ (as he then was) delivering judgment of the court, inter alia, had this to say:

> The point to note here is that both courts, civil and Shariah, are creatures of statutes. Both owe their existence to statutes, the Federal Constitution, the Act of Parliament and the state enactments. Both get their jurisdictions from statutes ie Constitution, federal law or state law, as the case may be. So it is to the relevant statutes that they should look to determine whether they have jurisdiction or not. Even if the Shariah Court does not exist, the civil court will still have to look at the statutes to see whether it has jurisdiction over a matter or not. Similarly, even if the civil court does not exist, the Shariah Court will still have to look at the statutes to see whether it has jurisdiction over a matter or not. Each court must determine for itself first whether it has jurisdiction over a particular matter in the first place, in the case of Shariah Courts in the States, by referring to the relevant State laws and in the case of shariah court in the federal territory, the relevant federal laws. Just because the other court does not have jurisdiction over a matter does not mean that it has jurisdiction over it. So, to take the example given earlier, if one of the parties is a non-Muslim, the Shariah Court does not have jurisdiction over the case, even if the subject matter falls within its jurisdiction. On the other hand, just because one of the parties is a

non-Muslim does not mean that the civil court has jurisdiction over that case if the subject matter is not within its jurisdiction.

So, there may be cases over which neither court has jurisdiction. It may be said that it cannot be so. In my view, it can be so, because either obtains its jurisdiction from statute, not from the fact that the other court does not have jurisdiction over the matter.

[17] Coming back to the instant appeal it is obvious that the subject matter of the case before the High Court is apostasy and we note that the learned trial judge has meticulously dealt with the predominant issue encompassing the case, ie jurisdiction, to which we have expressed our opinion as aforementioned. The sum total of our view is that we agree with the finding of the learned High Court judge that by virtue of art 121(1A) of the Federal Constitution and s 11(3)(b)(x) of the Enakmen Mahkamah Syariah (Terengganu) 2001 and also s 205(2) of the Administration of Islamic Religious Affairs Enactment 1986, matter pertaining to apostasy in the state is within the sole domain of the Shariah Court of the state. In the circumstances, we dismiss the appeal with costs.

Appeal dismissed with costs.

Reported by Kohila Nesan